87-1742

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

TERRE DU LAC ASSOCIATION, INC.,
Petitioner,

vs.

TERRE DU LAC, INC., TERRE DU LAC GOLF & COUNTRY CLUB, INC., TERRE DU LAC COUNTRY CLUB ASSOCIATES, a limited partnership, C.I.T. CORPORATION, SENSIBAR ENTERPRISES, INC., MO-ILL, LTD., and JAMES O. KWON,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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I

QUESTION PRESENTED

Whether acts of racketeering acitivity committed pursuant to a common scheme can constitute a "pattern of racketeering activity" within the meaning of 18 U.S.C. §§ 1961(5), 1962?

*

The Court has already granted a petition for a writ of certiorari in a case presenting substantially the same issue, *H. J. Inc. v. Northwestern Bell Telephone Company,* No. 87-1252 *cert. granted,* 56 U.S.L.W. 3647 (March 21, 1988). A similar issue is presented by the petition in *Marshall-Silver Construction Co., Inc. v. Mendel,* No. 87-1358 (filed February 12, 1988).

II

PARTIES BELOW

All of the parties to the proceedings below are listed in the caption. Terre Du Lac Association, Inc., Petitioner herein, is a not for profit corporation. It is not owned by any other corporation and has no subsidiaries.

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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

TERRE DU LAC ASSOCIATION, INC.,
Petitioner,

VS.

TERRE DU LAC, INC., TERRE DU LAC GOLF & COUNTRY CLUB, INC., TERRE DU LAC COUNTRY CLUB ASSOCIATES, a limited partnership, C.I.T. CORPORATION, SENSIBAR ENTERPRISES, INC., MO-ILL, LTD., and JAMES O. KWON,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner, Terre Du Lac Association, Inc. respectfully requests that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on December 1, 1987.

III

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 834 F.2d 148, and reprinted at pp. A-1-5 of this Petition. The Order and the Opinion of the District Court from which this appellate proceeding arises are not reported, but are reprinted at pp. A-6-12 of this Petition.

Earlier decisions of this Court, the Court of Appeals and the District Court in this case are reported at 475 U.S. 1082, 772 F.2d 467 and 601 F.Supp. 257, respectively.

IV

JURISDICTION

The judgment of the Court of Appeals for the Eighth Circuit was entered on December 1, 1987. A timely petition for rehearing en banc was denied on January 22, 1988. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

V

STATUTORY PROVISIONS INVOLVED

The texts of 18 U.S.C. §§ 1341, 1961, 1962, 1964 and 3575(e) are reprinted at pp. A-14-21 of the Petition.

VI

STATEMENT OF THE CASE

Petitioner, Terre Du Lac Association, Inc. (the "Association") is a not-for-profit corporation organized to own, administer and maintain the roads, lakes and other amenities and common areas of a recreational lake-lot type development know as Terre Du Lac.

The Respondents are persons involved in the development and marketing of lots in Terre Du Lac.

The development of Terre Du Lac was commenced in 1966. Between 1966 and 1975, more than 2600 lots were sold in Terre Du Lac. In 1975, Respondent Terre Du Lac, Inc. (which was the principal developer of Terre Du Lac) filed for reorganization in bankruptcy. The bankruptcy proceeding was concluded in 1977. At that time, the Respondents were in control of further development and marketing of lots in Terre Du Lac.

Between 1977 and 1983, Respondents sold lots in Terre Du Lac to approximately 900 persons in separate real estate sales

transactions. These sales were induced by fraudulent representations that:

(a) the roads in Terre Du Lac would be paved with an asphalt surface laid on a stabilized base;

(b) the amenities and common areas of Terre Du Lac would be conveyed to the Association free and clear of liens and encumbrances; and

(c) the water and sewage disposal systems in Terre Du Lac would be completed by the developers.

Respondents made repeated use of the mails first to perpetrate their fraud on the individual purchasers, and then to collect the proceeds of their fraud (the purchase prices for the properties and interest on the amounts financed). Consequently, they committed numerous acts of mail fraud in the course of these 900 separate sales transactions.

The Association (as distinguished from the purchasers of lots, who are the immediate victims of the fraudulent sales practices) has been injured by the cumulative effect of these acts of mail fraud because the success of the frauds caused:

> the cost of maintaining the roads in the Terre Du Lac subdivision, which roads the Association is legally obligated to maintain, to increase. The cost allegedly increased because: (1) the defendants invested the money which they obtained from the mail fraud (i.e. proceeds from the sale of lots in the subdivision) in their own operations rather than using the money to improve (i.e. pave with asphalt) the subdivision roads, and (2) the mail fraud scheme caused more lots to be sold, resulting in more roads and greater usage of the roads which are required to be maintained.

Terre Du Lac Association, Inc. v. Terre Du Lac, Inc., 772 F.2d 467, 472 (8th Cir. 1985).

The Association commenced the action in the District Court to secure relief from defendants' conduct. The Association's Amended Complaint alleges, among other matters, that defendants' commission of mail fraud in the course of some 900 separate real estate transactions constituted a "pattern of racketeering activity" within the meaning of 18 U.S.C. § 1962, and that it is entitled to relief pursuant to 18 U.S.C. § 1964. The Association alleged that the District Court had jurisdiction pursuant to 28 U.S.C. § 1331 and 18 U.S.C. §§ 1964, 1965.

The District Court initially dismissed the Association's RICO claim for failure to allege that defendants had been convicted of the predicate acts of racketeering activity alleged in the complaint. *Terre Du Lac Association, Inc. v. Terre Du Lac, Inc.*, 601 F.Supp. 257 (E.D. Mo. 1984). After that decision was reversed in *Terre Du Lac Association, Inc. v. Terre Du Lac, Inc.*, 772 F.2d 467 (8th Cir. 1985), *cert. denied*, 475 U.S. 1082 (1986), Respondents moved, pursuant to Rule 12(b)(6), Fed. R. Civ. P., to dismiss the Association's RICO claim a second time. The District Court granted that motion and dismissed the Association's RICO claim. The District Court concluded that no "pattern of racketeering activity" could be found where the predicate acts of racketeering activity occurred in the context of a single scheme.

The U.S. Court of Appeals for the Eighth Circuit affirmed the dismissal on those grounds. *Terre Du Lac Association, Inc. v. Terre Du Lac, Inc.*, 834 F.2d 148 (8th Cir. 1987). In rendering its decision, the Court of Appeals reaffirmed its adherence to a construction of RICO's "pattern" requirement that is inconsistent with this Court's decision in *Sedima S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479 (1985) and has been rejected by a clear majority of the Courts of Appeal that have considered the question.

VII

REASONS FOR ISSUANCE OF THE WRIT

A writ of certiorari should issue in this case because the rule of decision adopted by the Court of Appeals conflicts with the decision in *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479 (1985) and with decisions of the United States Court of Appeals for the First, Second, Third, Fourth, Seventh, Ninth and Eleventh Circuits.[1] Furthermore, issuance of the writ will avoid the substantial injustice that would otherwise result if the Court refused review in this case but, in deciding *H. J., Inc. v. Northwestern Bell Telephone Company*, No. 87-1252, *cert. granted*, 56 U.S.L.W. 3647 (March 21, 1988) rejects the rule of decision which forms the basis for the Court of Appeals' decision in the present case.

A. The Eighth Circuit's Present View Of A "Pattern Of Racketeering Activity" *Conflicts With The Decision In Sedima*

In affirming the dismissal of Petitioner's RICO claim in this case, the Court of Appeals reiterated its present[2] view that a pat-

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[1] *See e.g., Barticheck v. Fidelity Union Bank/First National State*, 832 F.2d 36 (3rd Cir. 1987); *Sun Savings and Loan Ass'n v. Dierdorff*, 825 F.2d 187 (9th Cir. 1987); *Roeder v. Alpha Industries, Inc.*, 814 F.2d 22 (1st Cir. 1987); *International Data Bank, Ltd. v. Zepkin*, 812 F.2d 149 (4th Cir. 1987); *United States v. Ianniello*, 808 F.2d 184 (2nd Cir. 1986), *cert. denied*, 107 S.Ct. 3229; *Morgan v. Bank of Waukegan*, 804 F.2d 970 (7th Cir. 1986); and *Bank of America v. Touche Ross & Co.*, 782 F.2d 966 (11th Cir. 1986).

[2] Prior to the decision in *Superior Oil Company v. Fulmer*, 785 F.2d 252 (8th Cir. 1986), the Court of Appeals adhered to the view that multiple acts of racketeering activity committed pursuant to a single scheme could form a pattern of racketeering activity. *See e.g., United States v. Dean*, 647 F.2d 779 (8th Cir. 1981), *cert. denied*, 456 U.S. 1006 (1981); *Alexander Grant & Company v. Tiffany Industries, Inc.*, 770 F.2d 717, 718, n. 1 (8th Cir. 1985).

tern of racketeering activity cannot be found to have occurred based on acts of racketeering activity committed pursuant to a single scheme.[3] Rather, according to the Court of Appeals, "something more" than a single scheme must be present — e.g. a similar scheme perpetrated by the same defendants at a different time or place. *Terre Du Lac Ass'n, Inc. v. Terre Du Lac, Inc.*, 834 F.2d 148, 149-50 (8th Cir. 1987). This view of the "pattern" requirement under RICO conflicts with both the actual holding of the Court in *Sedima* and the views which the Court expressed in that case concerning the pattern requirement under RICO.

In *Sedima*, the Court held that in order to recover under 18 U.S.C. § 1964(c), a plaintiff must demonstrate an injury consisting of "the harm caused by predicate *acts* sufficiently related to form a pattern . . . ." *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. at 497 (emphasis supplied). The Court of Appeals' view that a "pattern" cannot exist in the absence of multiple criminal schemes, taken in conjuction with this holding in *Sedima*, would mean that the remedy created by 18 U.S.C. § 1964(c) is available only to those rarest of persons who are repeatedly victimized (probably unintentionally) by defendants' criminal acts committed pursuant to separate schemes

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[3] This view was first enunciated by the Court of Appeals in *Superior Oil Company v. Fulmer*, 785 F.2d 252 (8th Cir. 1986). Since that decision was rendered by a panel of the Court of Appeals, it has provided the basis for rejecting every civil RICO claim reviewed by the Court of Appeals. *See Holmberg v. Morrisette*, 800 F.2d 205 (8th Cir. 1986), *cert. denied*, 107 S.Ct. 1953 (1987); *Deviries v. Prudential-Bache Securities, Inc.*, 805 F.2d 326 (8th Cir. 1986); *Madden v. Gluck*, 815 F.2d 1163 (8th Cir. 1987), *cert. denied*, 108 S.Ct. 86; *Ornest v. Delaware North Cos.*, 818 F.2d 651 (8th Cir. 1987); *Henning v. First Bank of Worthington*, No. 86-5320 (8th Cir. July 7, 1987); *H. J. Inc. v. Northwestern Bell Telephone Company*, 829 F.2d 648 (8th Cir. 1987), *cert. granted*, 56 U.S.L.W. 3647 (March 21, 1988); *Allright v. Billeter*, 829 F.2d 631 (8th Cir. 1987).

perpetrated in disparate times and/or places.[4] Rather than reading RICO broadly, as required by this Court and the statute itself, *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. at 497-98, the Court of Appeals for the Eighth Circuit has, as a practical matter, read 18 U.S.C. § 1964(c) out of the statute.

The Court of Appeals' view of RICO's pattern requirement is also inconsistent with the Court's description of the pattern requirement in *Sedima*. Under the views expressed in *Sedima*, a pattern of racketeering activity within the meaning of 18 U.S.C. § 1962 may exist when there have been two or more acts of racketeering activity, committed within ten years of each other,

> that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events.

Sedima, S.P.R.L. v. Imrex Co., Inc., 473 U.S. at 496, n. 14.[5] The Eighth Circuit's "pattern" requirement applied in this case — that the pattern of racketeering activity consist of separate schemes — clearly conflicts with these views, because it requires a conclusion that (a) there is no particular relationship between the schemes or (b) that defendants' conduct lacks temporal continuity.[6]

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[4] In the context of the scheme involved in this case, a remedy under 18 U.S.C. § 1964(c) would be available only if defendants had marketed lots in another development based on a similar fraudulent scheme. Even then, the remedy would extend only to the unlucky person(s) who bought lots in each of the different developments.

[5] Justice Powell's dissenting opinion goes even further, at least implying that the predicate acts should "be part of some common scheme". *Sedima*, 473 U.S. at 528 (Powell, J., dissenting).

[6] *Cf. United States v. Kragness*, 830 F.2d 842 (8th Cir. 1987) (multiple schemes perpetrated by groups of defendants having some common members).

Accordingly, the Court should issue its writ to ensure conformity between its decision in *Sedima* and the decisions of the Court of Appeals for the Eighth Circuit in cases arising under RICO.

B. The Decision Below Conflicts With Decisions From Other Circuits

With the exception of a single decision by the U.S. Court of Appeals for the Tenth Circuit[7], each of the Courts of Appeals that has considered the "multiple scheme" requirement adopted by the Eighth Circuit and applied in this case has rejected the requirement.

The first court of appeals to reject expressly the "multiple scheme" requirement after this Court's decision in *Sedima* was the Court of Appeals for the Seventh Circuit (the circuit in which the concept was first developed[8]). In *Morgan v. Bank of Waukegan*, 804 F.2d 970 (7th Cir. 1986), the court observed that if the "multiple scheme" requirement were adopted as a general rule, the result would be "untenable": "defendants who commit a large and ongoing scheme [such as the scheme in this case], albeit a single scheme, would automatically escape RICO liability for their acts." *Morgan v. Bank of Waulegan*, 804 F.2d at 975.

The issue was subsequently raised in a case pending before the Court of Appeals for the Second Circuit. That court analyzed the statute and concluded that "forcing" a multiple scheme requirement, as had the Eighth Circuit, "from the word 'pattern'

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[7] *Torwest DBC, Inc. v. Dick*, 810 F.2d 925 (10th Cir. 1987).

[8] *See Northern Trust Bank/O'Hare v. Inryco, Inc.*, 615 F.Supp. 828, 833 (N.D. Ill. 1985).

is a strained and inappropriate reading of the statutory language." *United States v. Ianniello,* 808 F.2d 184, 192 (2d Cir. 1986).

The Court of Appeals for the Ninth Circuit rejected the multiple scheme requirement for similar reasons. As that court stated:

> RICO requires repeated *acts*, not repeated *activity*. Thus, if a defendant commits two or more predicate acts that are not isolated events, are separate in time, and are in furtherance of a single criminal scheme, then RICO's pattern requirement is satisfied.

Sun Savings and Loan Ass'n v. Dierdorff, 825 F.2d 187 at 193 (9th Cir. 1987) (emphasis in original).

Other circuits have also rejected the multiple scheme requirement in whole or in part. *See Roeder v. Alpha Industries, Inc.*, 814 F.2d 22, 31 (1st Cir. 1987); *Barticheck v. Fidelity Union Bank/First National State*, 832 F.2d 36, 39 (3rd Cir. 1987). Thus, as this Court apparently recognized when granting the petition for certiorari in *H. J. Inc. v. Northwestern Bell Telephone Company*, No. 87-1252, 56 U.S.L.W. 3647 (March 21, 1988), there is a clear split of authority among the circuit courts of appeal which should be resolved by this Court.

C. It Would Be Manifestly Unjust To Reject The Association's Petition, In Light Of The Issuance Of The Writ In H. J. Inc.

In light of the fact that the Court has, apparently, undertaken to resolve the split of authority between the decisions of the Court of Appeals for the Eighth Circuit, and the decisions of other Courts of Appeals, *see H. J. Inc. v. Northwestern Bell Telephone Company*, No. 87-1252, *cert. granted* 56 U.S.L.W. 3657, the Court should issue its writ in this case in order to assure that the Association's RICO claim is not disposed of on the basis of a rule of decision that is subsequently rejected by

this Court. To do otherwise would result in manifest injustice to the Association.

VIII

CONCLUSION

The Court of Appeals for the Eighth Circuit initially paved the way for a reasoned construction of the pattern requirement under RICO with its decision in *United States v. Dean*, 647 F.2d 779 (8th Cir. 1981). Apparently in the interest of restraining the use of a disfavored remedy by the judiciary but mandated by Congress, the Court of Appeals has now abandoned that reasoned construction. In its place, the Eighth Circuit has adopted a construction of RICO's pattern requirement that is at odds with both the construction suggested by this Court's decision in *Sedima* and the construction adopted by the majority of the other circuit court of appeals. The Court should issue its writ in this case in order to reestablish a consistent, reasoned construction of RICO's pattern requirement throughout the judicial circuits.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 87-1222

Terre Du Lac Association, Inc., a not-for-profit corporation,
Appellant,

v.

Terre Du Lac, Inc.;
Appellee,

Terre Du Lac Utilities Corp., Terre Du Lac Golf and Country Club, Inc.; Terre Du Lac Country Club Association, a limited partnership; CIT Corporation; Sensibar Enterprises, Inc.; Moill, Ltd.; James O. Kwon,
Appellees.

Appeal from the United States District Court for the Eastern District of Missouri.

Submitted: October 13, 1987

Filed: December 1, 1987

Before ARNOLD, Circuit Judge, HENLEY, Senior Circuit Judge, and BOWMAN, Circuit Judge.

BOWMAN, Circuit Judge.

Terre Du Lac Association, Inc., appeals from an order entered by the District Court[1] dismissing the Association's Racketeer Influenced and Corrupt Organizations Act (RICO) claim against the defendants. We affirm the District Court's order.

This case involves an action filed by Terre Du Lac Association, Inc., a property owners' association, against Terre Du Lac, Inc. and other alleged developers of the Terre Du Lac subdivision. The subdivision is a private recreational land development located in southeastern Missouri. This is the second time the case has been before us. *See Terre Du Lac Ass'n v. Terre Du Lac, Inc.*, 772 F.2d 467 (8th Cir. 1985) (reversing the District Court's dismissal of the Association's RICO count), *cert. denied*, 106 S.Ct. 1460-61 (1986).

The Association alleges that defendants violated Sections 1962(a) and 1962(c) of the RICO statute by failing to fulfill their promises and representations relating to the paving of roads, the completion of the sewage and water systems, and the use and transfer of subdivision amenities. The claim is based upon predicate acts of mail fraud, *see* 18 U.S.C. §§ 1341, 1961(1)(B), and seeks equitable relief pursuant to Section 1964(a) of the Act.[2]

The District Court granted defendants' original motions to dismiss the RICO claim on the basis that "none of th[e] defendants ha[d] been convicted of any of the alleged predicate acts

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[1] The Honorable William L. Hungate, United States District Judge for the Eastern District of Missouri.

[2] The Association's complaint included sixteen counts. The District Court has dismissed every count and has entered its final judgment. This appeal concerns only the Association's RICO claim.

of mail fraud." *Terre Du Lac Ass'n v. Terre Du Lac, Inc.*, 601 F.Supp. 257, 261 (E.D. Mo. 1984). The Court relied upon *Sedima, S.P.R.L. v. Imrex Co.*, 741 F.2d 482 (2nd Cir. 1984), *rev'd*, 473 U.S. 479 (1985), in which the Second Circuit determined that a criminal conviction of a predicate act must precede a private civil suit under RICO.

Subsequent to the District Court's ruling, the Supreme Court reversed the Second Circuit's decision in *Sedima*. The Supreme Court held that a RICO action may proceed without a criminal conviction of a predicate act. *Sedima*, 473 U.S. at 488-93. In view of this holding, this Court found, on appeal, that "a reversal of the district court's dismissal of the RICO count [was] required, unless some other fatal defect in the complaint exist[ed]." *Terre Du Lac Ass'n*, 772 F.2d at 472.[3]

After the Supreme Court denied certiorari in 1986, defendants once again moved to dismiss the Association's RICO claim. The District Court granted this motion. The court held that the Association had not shown a pattern of racketeering activity because it had alleged only a single fraudulent scheme. *Terre Du Lac Ass'n v. Terre Du Lac, Inc.*, No. 83-2577C(3), slip op. at 2-5 (E.D. Mo. Sept. 24, 1986). Further, the District Court held that the "law of the case" doctrine did not foreclose the dismissal since the "pattern of racketeering activity" issue had not been presented or decided in the prior appeal. *Id.* at 5-6. The Association appeals these rulings.

Under the prior decisions of this Court, it is clear that the Association has failed to state a RICO claim. To establish a claim under RICO there must be "(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity." *Sedima*, 473 U.S. at 496 (footnote omitted). Following the Supreme

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[3] The defendants argued in that appeal that such a defect did exist in that the complaint failed to allege sufficient facts supporting the Association's standing to pursue the RICO count. The Court rejected this claim. *Terre Du Lac Ass'n*, 772 F.2d at 472-73.

Court's decision in *Sedima*, we held in *Superior Oil Co. v. Fulmer*, 785 F.2d 252 (8th Cir. 1986) that something more than a single scheme is required in order to establish a pattern of racketeering activity. *Id.* at 257. In subsequent cases, we have consistently upheld this requirement. *See e.g., United States v. Kragness*, Nos. 86-5087 to -5091, slip op. at 26-28 (8th Cir. Sept. 28, 1987) (to be reported at: 830 F.2d 842); *H. J. Inc. v. Northwestern Bell Tel. Co.*, No. 87-5121, slip op. at 2-4 (8th Cir. Sept. 22, 1987) (to be reported at: 829 F.2d 648); *Allright Mo., Inc. v. Billeter*, Nos. 86-1476 & 1537, slip op. at 17-19 (8th Cir. Sept. 16, 1987) (to be reported at: 829 F.2d 631); *Ornest v. Delaware N. Cos.*, 818 F.2d 651, 652 (8th Cir. 1987); *Madden v. Gluck*, 815 F.2d 1163, 1164 (8th Cir.), *cert. denied*, 108 S.Ct. 86 (1987); *Deviries v. Prudential-Bache Securities, Inc.*, 805 F.2d 326, 329 (8th Cir. 1986); *Holmberg v. Morrisette*, 800 F.2d 205, 209-10 (8th Cir. 1986), *cert. denied*, 107 S.Ct. 1953 (1987).

Here, the District Court concluded, and the Association does not contest, that the alleged predicate acts of mail fraud constitute parts of a single allegedly fraudulent scheme to market Terre Du Lac property. There are no allegations that defendants have engaged in similar activities in the past or that they are engaged in similar fraudulent activities elsewhere. Therefore, we hold that under the rule of *Superior Oil* and its progency the Association's RICO claim was properly dismissed.

Further, we agree with the District Court that the "law of the case" doctrine does not bar the dismissal of the Association's RICO claim. In the first appeal, this Court did not consider the "pattern of racketeering activity" issue. "[T]he law of the case established by a prior appeal does not extend to preclude consideration of issues not presented or decided on the prior appeal." *Conway v. Chemical Leaman Tank Lines*, 644 F.2d 1059, 1062 (5th Cir. 1981). *See also Kuhn v. National Ass'n of Letter Carriers, Branch 5*, 570 F.2d 757, 759 n.3 (8th Cir. 1978).

Since the Association's RICO claim must fail because of the pattern requirement established in *Superior Oil*, we need not address defendants' alternative arguments. The decision of the District Court is affirmed.

A true copy.

Attest:

Clerk, U.S. Court Of Appeals, Eighth Circuit.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 83-2577C(3)

Terre Du Lac Association, Inc.,
Plaintiff,

v.

Terre Du Lac, Inc., et al.,
Defendants.

ORDER

(Filed Sept. 24, 1986)

A memorandum dated this day is hereby incorporated into and made a part of this order.

IT IS HEREBY ORDERED that the renewed motion to dismiss of defendants Terre du Lac Golf and Country Club, Terre du Lac Country Club Association, Sensibar Enterprises, Inc., and MO-ILL, Inc., and the motions to dismiss of defendants Terre du Lac, Inc., and James O. Kwon and C.I.T. Corporation be and the same are granted only insofar as they seek dismissal of Count Fifteen of plaintiff's complaint. The motions are denied in all other respects.

IT IS HEREBY FURTHER ORDERED defendants Terre du Lac, Inc., and Kwon be and the same are granted leave to file their counterclaims.

IT IS HEREBY FURTHER ORDERED that plaintiff's motion to strike counterclaims be and the same is denied.

Dated this 24th day of September, 1986.

/s/ William L. Hungate
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 83-2577C(3)

Terre Du Lac Association, Inc.,
Plaintiff,

v.

Terre Du Lac, Inc., et al.,
Defendants.

MEMORANDUM

(Filed Sept. 24, 1986)

This matter is before the Court on plaintiff's motion to strike counterclaims, and motions to dismiss filed by various defendants.

Plaintiff filed this case on November 8, 1983, alleging sixteen counts against defendants. Counts One through Six were based upon the Interstate and Land Sales Full Disclosure Act, 15 U.S.C. §§ 1701-1720. Counts Seven through Fourteen were based on pendent state law claims. Count Fifteen was based upon the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961-1968, and Count Sixteen was based on the Sherman Antitrust Act, 15 U.S.C. §§ 1-7.

On August 31, 1984, the Court granted defendants' motions to dismiss all counts of plaintiff's complaint. *Terre du Lac Association, Inc. v. Terre du Lac, Inc.*, 601 F.Supp. 257, 262 (E.D. Mo. 1984). On appeal, the Eighth Circuit affirmed the dismissal of the Land Sales Act counts, but reversed the dismissal of the RICO and antitrust counts, and vacated the dismissal of the pendent state claims. *Terre du Lac Association, Inc. v. Terre du Lac, Inc.*, 772 F.2d 467, 475 (8th Cir. 1985). On March 24, 1986, the United States Supreme Court denied all

parties' applications for writ of certiorari. *Id.*, 106 S.Ct. 1460, 1461 (1986).

On April 10, 1986, the Court dismissed the pendent state claims at plaintiff's request. Thus, the only counts remaining in plaintiff's complaint are Count Fifteen, the RICO claim, and Count Sixteen, the antitrust claim.

Plaintiff's RICO claim will be dismissed. In this count, plaintiff, a property owner's association, alleges that defendants, developers of the Terre du Lac subdivision, violated § 1962(a) and (c) by failing to fulfill promises relating to the paving of roads, the completion of sewage and water systems, and the use and transfer of subdivision amenities. Plaintiff bases this claim on predicate acts of mail fraud and seeks equitable relief pursuant to § 1964 of RICO.

The Court originally dismissed this count because none of the defendants were convicted of the predicate acts of mail fraud. *Terre du Lac, supra,* 601 F.Supp. at 261. The Court relied on *Sedima, S.P.R.L. v. Imrex Co.,* 741 F.2d 482 (2d Cir. 1984) for its action. The Supreme Court, however, later reversed the Second Circuit and held that a RICO claim may proceed without a criminal conviction of a predicate act. *Sedima, S.P.R.L. v. Imrex co.,* 105 S.Ct. 3275 (1985). Accordingly, the Eighth Circuit reversed this Court's decision.

In *Sedima,* the Supreme Court determined that a violation of § 1962(c) requires (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity. *Sedima, supra,* 105 S.Ct. at 3285. Defendants now contend that plaintiff has not alleged a pattern of racketeering activity.[1] This Court agrees.

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[1] Although plaintiff asserts its RICO claim under § 1962(a) as well as § 1962(c), the former section also requires a pattern of racketeering activity. *Superior Oil Co. v. Fulmer,* 785 F.2d 252, 255 n.1 (8th Cir. 1986).

A pattern of racketeering activity requires more than one fraudulent scheme. This concept has evolved from *Sedima* and its progeny. In *Sedima,* the Supreme Court suggested that the "pattern" element of a RICO violation requires evidence of criminal conduct characterized by "*continuity plus relationship.*" *Id.* at 3285 n.14. This two-prong "pattern" test was recently applied by the Eighth Circuit in *Superior Oil Co. v. Fulmer,* 785 F.2d 252 (8th Cir. 1986). The Court there found that Superior Oil had proven the "relationship prong" by showing that defendants committed several related acts of wire fraud in pursuit of their conversion or theft of gas from Superior's interstate pipeline. Superior, however, failed to prove "continuity" because defendants' actions

> comprised one continuing scheme to convert gas from Superior Oil's pipeline. There was no proof that [defendants] had ever done these activities in the past and there was no proof that they were engaged in other criminal activities elsewhere.

Id. at 257. The Eighth Circuit cited with approval similar post-*Sedima* opinions in which district courts dismissed RICO claims for failure to allege more than one fraudulent scheme. *Id.* at 257-58 n.8.[2]

Plaintiff argues that *Superior Oil* does not require that more than one fraudulent scheme be shown in order to prove a pattern of racketeering activity. In support of this claim, plaintiff points to the Eighth Circuit's citation to a portion of Justice Powell's dissenting opinion in *Sedima. Superior Oil, supra* at 256-57.

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[2] This district recently rendered several similar decisions. *Madden v. Bluck,* 636 F.Supp. 463 (E.D. Mo. 1986); *Clodfelter v. Thurston,* 637 F.Supp. 1034 (E.D. Mo. 1986); *Allright Missouri, Inc. v. Billeter,* 631 F.Supp. 1328 (E.D. Mo. 19 6).

The Court is not persuaded by plaintiff's argument that a single fraudulent scheme is sufficient to invoke the effect of the RICO statute. The Eighth Circuit has explicitly set forth the essential elements necessary to meet RICO's "pattern" requirement. That court cited with favor cases in which a single scheme, encompassing multiple acts of mail or wire fraud, occurring over a long period of time, was held not sufficent to establish the pattern of racketeering activity necessary for purposes of 18 U.S.C. § 1962. The RICO statute and its construction as first applied in the Seventh Circuit, *see Schacht v. Brown,* 711 F.2d 1343 (7th Cir. 1983), *cert. denied,* 464 U.S. 1002 (1983), has evoked a flurry of scholarly essays — not all favorable. *See generally* Goldsmith and Keith, *Civil RICO Abuse: The Allegations in Context,* 1986 Brigham Young University Law Review 55; Burnett, *Federal Civil RICO: Essential Reforms Necessary to Achieve Balanced Federalism Between Federal and State Courts and the Efficient Administration of Justice,* 33 Fed. B N & J 200 (1986); Cole and McNamara, *Civil RICO After Sedima,* 12 Litigation J. of the Section of Litigation A.B.A. 24 (1986). Efforts to cut the garment to fit the cloth come from savants academicians and trial practitioners.

Here, plaintiff has not shown a pattern of racketeering activity because it has alleged only a single fraudulent scheme. In its memorandum opposing defendants' motions, plaintiff admits this finding by characterizing its RICO claim as:

> based upon separate frauds perpetrated upon as many as 3400 individuals over a decade, the combined effect of which has been to result in injury [to plaintiff]. The frauds were related, in that they were perpetrated as part of a common scheme to market lots in the Terre Du Lac development.

The Court concludes that the alleged predicate acts of mail fraud constitute parts of one fraudulent scheme to market Terre

du Lac lots. Plaintiff does not allege that defendants have done these activities in the past or that they were engaged in other criminal activity elsewhere. Consequently, plaintiff fails to state a viable RICO claim.

The Court is not foreclosed from dismissing plaintiff's RICO count by the "law of the case" doctrine. Plaintiff argues that the Eighth Circuit has ruled that this count states a claim for relief and that this ruling establishes the law of the case that must be followed in all subsequent proceedings. As defendants correctly argue, however, the "law of the case" doctrine is not an absolute bar to lower court reconsideration. *Lehrman v. Gulf Oil Corp.*, 500 F.2d 659, 663 (5th Cir.), *cert. denied*, 420 U.S. 929 (1974). Moreover, the doctrine is inapplicable to issues not presented or decided on prior appeal. *Conway v. Chemical Leaman Tank Lines, Inc.*, 644 F.2d 1059, 1062 (5th Cir. 1981). The Eight Circuit did not consider whether plaintiff had alleged a pattern of racketeering activity.

Plaintiff's antitrust claim will not be dismissed. Plaintiff alleges that defendants charge lot owners a $3,000 initiation fee to join the Terre du Lac Golf and Country Club if they purchased their lots from persons other than defendants, but offer free club memberships to those who buy lots from defendants. Plaintiff contends this conduct is a per se violation of § 1 of the Sherman Act and seeks injunctive relief pursuant to 15 U.S.C. § 26.

Defendants argue that plaintiff's antitrust claim (1) is unsupported by fact; (2) is barred by res judicata; (3) insufficiently pleads the essential elements of the alter ego doctrine against defendants Terre du Lac Country Club Association, Sensibar Enterprises, Inc., and MO-ILL, Inc.; and (4) fails to plead fraud with particularity under Fed. R. Civ. P. 9(b).

Each of defendants' arguments is unpersuasive at this juncture. Viewing the complaint in the light most favorable to plaintiff, the Court finds that plaintiff may prove facts in support of

its claim that would entitle it to relief. *See Conley v. Gibson,* 355 U.S. 41, 45-46 (1957). Moreover, the Court concludes that plaintiff's antitrust claim is sufficiently pleaded and is not barred by res judicata.

Plaintiff's motion to strike counterclaims will be denied. On April 30, 1986, defendants Terre du Lac, Inc., and James O. Kwon filed as separate documents their answer, counterclaims, and motion to dismiss. On May 22, 1986, plaintiff filed the instant motion, arguing, in essence, that even though the answer and counterclaims were filed on the same day, they cannot be filed as separate documents without leave of court under Fed. R. Civ. P. 7(a) and 13(f). Plaintiff cites no cases in support of its argument.

Upon careful consideration, the Court determines the counterclaims should have been set forth in the defendants' answers, *see* Fed. R. Civ. P. 7(a), 13(a), 13(b), 13(f); *In re Cessna Distributorship Antitrust Litigation,* 532 F.2d 64, 67 n.7 (8th Cir. 1976) (discussing cross-claim), *cert. denied,* 423 U.S. 947 (1977). The Court will now grant defendants Terre du Lac, Inc., and Kwon leave to file their counterclaims as presently filed.

Dated this 24th day of September, 1986.

/s/ William L. Hungate
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 87-1222-EM

Terre Du Lac Association, Inc., etc.,
Appellant,

v.

Terre Du Lac Golf and Country Club, et al.,
Appellees.

Appeal form the United States District Court for the
Eastern District of Missouri

Appellant's petition for rehearing en banc has been considered by the Court and is denied.

Petition for rehearing by the panel is also denied.

January 22, 1988

Order Entered at the Direction of the Court:

/s/ Robert D. St. Vrain

Clerk, United States Court of Appeals, Eighth Circuit

APPENDIX D

STATUTES INVOLVED

18 U.S.C. § 1341. Frauds and swindles

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

18 U.S.C. § 1961. Definitions

As used in this chapter —

(1) "racketeering activity" means (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472 and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzelement

from pension and welfare funds), section 891-894 (relating to extortionate credit transactions), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), sections 1461-1465 (relating to obscene matter), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1512 (relating to tampering with a witness, victim or an informant), section 1513 (relating to retaliating against a witness, victim or informant), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), section 1957 (relating to engaging in monetary transactions in property derived from specified unlawful activity), sections 2312 and 2313 (relating to interstate transportation of stolen motor vehicles), sections 2314 and 2315 (relating to interstate transportation of stolen property), section 2320 (relating to trafficking in certain motor vehicles or motor vehicle parts), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzelment from union funds), (D) any offense involving fraud connected with a case under title 11, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States, or (E) any act which is indictable under the Currency and Foreign Transactions Reporting Act;

(2) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof;

(3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

(6) "unlawful debt" means a debt (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision thereof, or which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate;

(7) "racketeering investigator" means any attorney or investigator so designated by the Attorney General and charged with the duty of enforcing or carrying into effect this chapter;

(8) "racketeering investigation" means any inquiry conducted by any racketeering investigator for the purpose of ascertaining whether any person has been involved in any violation of this chapter or of any final order, judgment, or decree of any court of the United States, duly entered in any case or proceeding arising under this chapter;

(9) "documentary material" includes any book, paper, document, record, recording, or other material; and

(10) "Attorney General" includes the Attorney General of the United States, the Deputy Attorney General of the United States, any Assistant Attorney General of the United States, or any employee of the Department of Justice or any employee of any department or agency of the United States so designated by the Attorney General to carry out the powers conferred on the Attorney General by this chapter. Any department or agency so designated may use in investigations authorized by this chapter either the investigative provisions of this chapter or the investigative power of such department or agency otherwise conferred by law.

18 U.S.C. § 1962. Prohibited activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in aquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt

to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

18 U.S.C. § 1964. Civil remedies

(a) The district courts of the United States shall have jurisdiction to prevent and restain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

(b) The Attorney General may institute proceedings under this section. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

(d) A final judgment or decree rendered in favor of the United States in any criminal proceeding brought by the United States under this chapter shall estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceding brought by the United States.

18 U.S.C. § 3575. Increased sentence for special offenders

(e) A defendant is a special offender for purposes of this section if —

(1) the defendant has previously been convicted in courts of the United States, a State, the District of Columbia, the Com;monwealth of Puerto Rico, a territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof for two or more offenses committed on occasions different from one another and from such felony and punishable in such courts by death or imprisonment in excess of one year, for one or more of such convictions the defendant has been imprisoned prior to the commission of such felony, and less than five years have elapsed between the commission of such felony and either the defendant's release, on parole or otherwise, from imprisonment for one such conviction or his commission of the last such previous offense or another offense punishable by death or imprisonment in excess of one year under applicable laws of the United States, a State, the District of Columbia, the Commonwealth of Puerto Rico, a territory or possession of the United States, any political subdivision, or any department, agency or instrumentality thereof; or

(2) the defendant committed such felony as part of a pattern of conduct which was criminal under applicable laws of any jurisdiction, which constituted a substantial source of his income, and in which he manifested special skill or expertise; or

(3) such felony was, or the defendant committed such felony in furtherance of, a conspiracy with three or more other persons to engage in a pattern of conduct criminal under applicable laws of any jurisdiction, and the defendant did, or agreed that he would, initiate, organize, plan, finance, direct, manage, or supervise all or part of such conspiracy or conduct, or give or receive a bribe or use force as all or part of such conduct.

A conviction shown on direct or collateral review or at the hearing to be invalid or for which the defendant has been pardoned on the ground of innocence shall be disregarded for purposes of paragraph (1) of this subsection. In support of findings under paragraph (2) of this subsection, it may be shown that the defendant has had in his own name or under his control income or property not explained as derived from a source other than such conduct. For purposes of paragraph (2) of this subsection, a substantial source of income means a source of income which for any period of one year or more exceeds the minimum wage, determined on the basis of a forty-hour week and a fifty-week year, without reference to exceptions, under section 6(a)(1) of the Fair Labor Standards Act of 1938 (52 Stat. 1602, as amended 80 Stat. 838), and as hereafter amended, for an employee engaged in commerce or in the production of goods for commerce, and which for the same period exceeds fifty percent of the defendant's declared adjusted gross income under section 62 of the Internal Revenue Act of 1954 (68A Stat. 17, as amended 83 Stat. 655), and as hereafter amended. For purposes of paragraph (2) of this subsection, special skill or expertise in criminal conduct includes unusual knowledge, judgment or ability, including manual dexterity, facilitating the initiation, organizing, planning, financing, direction, management, supervision, execution or concealment of criminal conduct, the enlistment of accomplices in such conduct, the escape from detection or apprehension for such conduct, or the disposition of the fruits or proceeds of such conduct. For purposes of paragraphs

(2) and (3) of this subsection, criminal conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events.